IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR MARICOPA COUNTY

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR 97-03949(A)
	)	
vs.	)	
	)	
LEROY D. CROPPER,	)	SPECIAL VERDICT
	)	
Defendant.	)	
_____	)	

On May 6, 1999, Defendant entered a plea of guilty to Murder in the First Degree, a Class One Dangerous Felony.

It is the judgment of the Court that Defendant is guilty of this crime.

Pursuant to A.R.S. §13-703(B), the Court conducted a presentence hearing on April 11, April 12, April 18, April 19, July 27, and August 15, 2000. Both parties were given the opportunity to present evidence and argument concerning (1) the aggravating and mitigating circumstances set forth in A.R.S. §13-703 (F) and (G), and (2) "non-statutory" mitigating circumstances. After reviewing the sentencing memoranda filed by the State and the Defendant, the Court heard oral argument on October 13, 2000. The Court read the presentence report, but not until after completing the portion of this Special Verdict that addresses aggravating circumstances. The Court read the presentence report to determine whether it contained any (1) mitigating information not proffered by Defendant, (2) information that might support any of the mitigating circumstances urged by Defendant, and/or (3) information that might rebut any of the aggravating circumstances urged by the State. The Court did not discover any information or evidence that might fall under any of these categories. The only information contained in the presentence report not previously known to the Court relates to restitution.[i]

1. Enmund/ Tison

Pursuant to Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987), the Court finds, beyond a reasonable doubt, that Defendant killed, and intended to kill, Arizona Department of Corrections Officer Brent W. Lumley.

2. Aggravating Circumstances

It is the State's burden to allege, then prove, the existence of aggravating circumstances. The standard is "proof beyond a reasonable doubt." Because the State has not alleged the aggravating circumstances set forth in A.R.S. §13-703(F)(1), (3), (4), (5), (8), (9), and (10), the Court finds that none of these aggravating circumstances exists.

A. A.R.S. §13-703(F)(2) (Previous conviction of a serious offense)

The record reflects that, on June 22, 2000, Defendant entered a plea of guilty to the crime of aggravated assault, a Class 3 "dangerous" felony, in connection with Maricopa County Superior Court Cause No. CR 2000-000245. The charge arose out of an event that occurred on December 10, 1999, in which Defendant stabbed Antoin Jones, a fellow inmate, with a metal shank. This crime is "serious" as that term is defined by A.R.S. §13-703(H). Defendant urges that the use of a conviction that occurred not only after the date of the subject murder, but after Defendant entered a plea of guilty to that murder, violates various provisions of the United States Constitution, the Arizona Constitution, and the Arizona Rules of Criminal Procedure. Defendant cites no authority for these claims, and the Court rejects them.

The Arizona Supreme Court has had several occasions to explain why convictions arising out of acts that occur after the subject murder can support a finding pursuant to §13-703(F)(2) as long as the conviction is entered prior to the sentencing hearing on that murder. *See, e.g.*, State v. McKinney, 185 Ariz. 567, 917 P.2d 1214 (1996); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). These cases stand for the proposition that the purpose of a sentencing hearing is to bring to light information concerning the defendant's character, thus enabling the court to impose a sentence that fits the offender as well as the offense. *See also* State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979).

The Court finds, beyond a reasonable doubt, that this aggravating circumstance exists.

B. A.R.S. §13-703(F)(6) (Murder committed in an especially heinous, cruel, or depraved manner)

The State contends that Defendant killed Officer Lumley in an especially heinous, cruel, or depraved manner. The State urges that the murder was committed in an especially heinous or depraved manner because (1) Defendant relished the murder, and (2) the murder was senseless.[ii] Defendant responds that he did not "relish" the murder as that term is defined by Arizona law and, even if he did, that factor alone does not warrant the conclusion that the murder was committed in an especially heinous or depraved manner. The State urges that the murder was especially cruel because Defendant caused Officer Lumley to suffer both physical pain and mental anguish before he died. Defendant contends that, although his conduct was "cowardly," he did not kill Officer Lumley in an especially cruel manner. [iii]

Several observations about A.R.S. §13-703(F)(6) must precede the factual and legal analysis. First, the Court concludes that the legislature made a deliberate choice when it utilized the term "especially." Had it failed to employ such a qualifier, this aggravating circumstance would be susceptible to constitutional challenge. *See* State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981). Second, the Arizona Supreme Court has provided specific, objective definitions for each of the operative terms. In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), the court provided the following definitions:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

114 Ariz. at 543, 562 P.2d at 716. Based on these definitions, it has long been the law in Arizona that the "especially cruel" inquiry focuses upon the physical pain and/or mental anguish visited upon the victim. By contrast, the question whether a killing was committed in an especially heinous or depraved manner requires the Court to focus upon the killer's state of mind as evidenced by his words and conduct. *See, e.g.*, State v. Medrano, 173 Ariz. 393, 844 P.2d 560 (1992). Third, because the operative terms are set forth in the disjunctive, the State need prove only one of them for this aggravating circumstance to exist. *Id*.

1. Did Defendant commit this murder in an especially heinous or depraved manner?

In State v. Gretzler, supra, the supreme court identified five factors that are to be considered in determining whether a murder was committed in an especially heinous or depraved manner: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim; (3) the mutilation of the victim; (4) the senselessness of the murder; and (5) the helplessness of the victim. 135 Ariz. at 51-53, 659 P.2d at 10-12. [iv]

The State urges that Defendant's actions and words before, during, and after his assault upon Officer Lumley demonstrate that he relished the murder. The evidence indicates that, not long before the attack, Defendant told his cellmate that he wanted to go after Officer Lumley because a man was more likely to put up a fight.[v] Defendant admits that he stayed in the control room while Officer Lumley expired. Defendant wrote various letters after the killing, at least one of which suggests that he enjoyed the effect his conduct of March 7, 1997, had on prison employees and prison life in general. [vi] In this letter, Defendant used the phrase "In your neck." The fact that this phrase does not appear in correspondence authored by Defendant prior to March 7, 1997, to which this Court has access, suggests that this language is directly related to the murder of Officer Lumley.[vii]

These circumstances do not compel the conclusion that Defendant "relished" the murder, at least as that term has been construed by the Arizona Supreme Court. The fact that Defendant wanted a violent confrontation does not mean he relished administering the fatal wound. Although the act of watching one's victim die permits the Court to draw certain inferences about the actor, it does not lead to the conclusion that the actor relished the killing. In the Court's view, the post-murder letters constitute the most compelling evidence that Defendant relished this killing. However, the law is that "post-murder statements . . . constitute 'relishing' only when they indicate, beyond a reasonable doubt, that the killer savored or enjoyed the murder at or near the time of the murder." State v. Greene, 192 Ariz. 431, 440-41, 967 P.2d 106, 115-16 (1998). Defendant authored the letter in question on May 5, 1997, which was two months after the murder. Logic dictates that, the more remote a post-murder statement, the less likely it is to provide insight into the killer's state of mind at or near the time of the murder. Defendant's words and actions clearly portray a callous, remorseless attitude. However, in the Court's view, they do not prove, beyond a reasonable doubt, that Defendant relished the murder.

Next, the State urges that this killing was senseless. The Court agrees. Officer Lumley did nothing to provoke, or demonstrate a lack of respect toward, Defendant. As a matter of fact, the evidence suggests just the converse: during the "search" of Defendant's cell, Defendant became angry when another guard mistreated his property. Officer Lumley provided a calming influence and appears to have responded in a manner that showed respect to Defendant. After the lockdown, Officer Lumley personally delivered lunch to Defendant. At that time, Officer Lumley told Defendant, in the presence of Defendant's cellmate, that he (Officer Lumley) would return some of Defendant's property to Defendant before the shift change.[viii] Officer Lumley's reward was death by stabbing. He did not do anything wrong, and most certainly did not deserve to die. The circumstances permit no conclusion other than that this was a senseless killing. However, "senselessness" alone does not warrant a finding that a killing was committed in an especially heinous or depraved manner.

The Court concludes that the State has not established that Defendant killed Officer Lumley in an especially heinous or depraved manner.

2. Did Defendant commit this murder in an especially cruel manner?

In State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995), the supreme court held that, in order to establish that a murder was committed in an "especially cruel" fashion, "the state must prove beyond a reasonable doubt that the victim was conscious and suffered pain or distress at the time of the offense." 182 Ariz. at 311, 896 P.2d at 851. The court went on to note that the length of suffering is not dispositive; even a brief period of suffering can warrant a finding that the murder was committed in an especially cruel manner. Assuming the state proves conscious suffering on the part of the victim after the fatal wound was

inflicted, it must then show that the suffering was "objectively foreseeable." *Id*. The perpetrator's subjective intent is irrelevant.

Dr. Philip Keen, the Maricopa County Medical Examiner, testified about the wounds sustained by Officer Lumley. According to Dr. Keen, Officer Lumley was stabbed five or six times. Dr. Keen testified that, given the nature and location of the wounds, Officer Lumley would have been conscious for approximately three to five minutes following the infliction of the fatal wound and that he would have suffered physical pain during that time.[ix] The court concludes that the state has proved, beyond a reasonable doubt, that Officer Lumley was conscious for several minutes after he was stabbed and that he did, indeed, suffer physical pain. It is likely that, in addition to the physical pain, Officer Lumley suffered mental anguish during and immediately after the attack. However, the Court is unable to conclude, beyond a reasonable doubt, that he did so.

The next question is whether Officer Lumley's suffering was foreseeable to Defendant. The Court concludes that it was. For purposes of the "foreseeability" analysis, the Bolton court distinguished between two kinds of killings: gunshots to the head and stabbings. Bolton stabbed his victim to death. The supreme court concluded that Bolton "must have known, or at least should have known, that the wound would be painful and that the victim would not die immediately." 182 Ariz. at 312, 896 P.2d at 852. So it is here.[x]

The Court finds, beyond a reasonable doubt, that Defendant killed Officer Lumley in an especially cruel manner. Therefore, the State has proved the aggravating circumstance set forth in A.R.S. §13-703(F)(6).

C. A.R.S. §13-703(F)(7) (Murder committed while defendant was in the custody of the Arizona Department of Corrections)

Defendant concedes that this aggravating circumstance has been established. The Court finds, beyond a reasonable doubt, that this aggravating circumstance exists.

3. Mitigating Circumstances

Defendant urges the Court to find six mitigating circumstances, one of which is "statutory" and the others "non-statutory."

Mitigating evidence is defined as "any aspect of the defendant's character or record and any circumstance of the offense *relevant* to determining whether a sentence less than death might be appropriate." State v. Clabourne, 194 Ariz. 379, 388, 983 P.2d 748, 757 (1999)(citations omitted) (emphasis in original). Although a court "must consider any proffered evidence, it should not accept it as mitigating unless (1) the defendant has proven the fact or circumstance by a preponderance of the evidence (citation omitted), and (2) the court has determined that it is in some way mitigating." *Id*.

A. A.R.S. §13-703(G)(1) (Significantly impaired capacity to appreciate the wrongfulness of one's conduct or to conform that conduct to the requirements of law)

Defendant urges that, when he killed Officer Lumley, his capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law were significantly impaired.[xi] In analyzing this claim, the Court has considered the testimony and reports of the various experts, Defendant's trial testimony, [xii] and all other evidence that might bear on his mental and emotional condition at or near the time of the murder.

Evidence presented during the presentence hearing indicates that Defendant has a bipolar personality disorder and that he suffers from post-traumatic stress disorder. The Court finds, by a preponderance of the evidence, that Defendant suffered from both disorders on March 7, 1997. The fact that he had these disorders, however, does not establish this mitigating circumstance. It is incumbent upon Defendant to show a causal relationship between either or both disorders and his conduct of March 7, 1997. State v. Clabourne, supra.

Dr. Dorothy Lewis opined that, during the search of Defendant's cell, he had a "flashback" to his youth and the abuse visited upon him by his stepmother. In this scenario, Officer Lumley "became" Defendant's father, who typically stood by and acquiesced in Defendant's stepmother's abusive treatment of Defendant. Defendant became enraged and took out his anger on Officer Lumley. Ultimately, Dr. Lewis concluded that Defendant's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law were significantly impaired.[xiii]

With due respect to Dr. Lewis, the Court concludes that Defendant has failed to show, by a preponderance of the evidence, either "significant impairment" or the causal connection between such impairment and the murder that the law requires. Defendant's claim that he experienced a "flashback" that resulted in the attack upon Officer Lumley would be more persuasive had he taken action during, or immediately following, the search of his cell. Instead, he attacked Officer Lumley hours later, after having the opportunity to plan the attack and conspire with other inmates. Defendant's testimony concerning the events of March 7, 1997, taken in conjunction with other evidence relating to his conduct and mental state, compels the conclusion that he knew precisely what he was doing when he planned, and later carried out, his assault upon Officer Lumley. For the reasons expressed in the State's Response to Defendant's Mitigation, dated October 10, 2000, the Court further concludes that Defendant's reliance on State v. Stuard, 176 Ariz. 589, 863 P.2d 881 (1993), and State v. Jimenez, 165 Ariz. 444, 799 P.2d 785 (1990), is misplaced.

Having rejected Defendant's claim that his capacity to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of law was significantly impaired, the Court must next consider whether the evidence warrants a finding of impairment in either respect as a non-statutory mitigating circumstance, particularly in view of Defendant's claim that he has a long-standing history of substance abuse. State v. Gallegos, 178 Ariz. 1, 870 P.2d 1097 (1994). Although Gallegos requires this separate inquiry, and while it is not identical to the §13-703 (G)(1) inquiry, the Court reaches the same conclusion. Assuming some degree of impairment short of that required by §13-703(G)(1), Defendant has once again failed to establish, by a preponderance of the evidence, the causal link between the impairment and the murder that the law requires.

B. Dysfunctional Family

In State v. Sharp, 193 Ariz. 414, 973 P.2d 1171 (1999), the defendant offered evidence concerning what the supreme court characterized as a "horrific" childhood. 193 Ariz. at 425, 973 P.2d at 1182. The supreme court affirmed the trial judge's rejection of Sharp's claim for two reasons: (1) the claim was based solely on self-reported evidence, and (2) Sharp failed to establish a causal connection between his childhood and the murder. Defendant's claim is based on much more than self-reported information. The evidence establishes that Defendant's upbringing was extraordinarily abusive and demeaning. The next question is whether Defendant has shown a causal connection between his upbringing and the events of March 7, 1997.[xiv] For the reasons set forth above, the Court rejects the scenario suggested by Dr. Lewis concerning family dynamics and their claimed impact upon the events of March 7, 1997. Although the Court concludes that Defendant has shown, by a preponderance of the evidence, that he is the product of a dysfunctional family, the other, equally important, half of the equation is missing. Absent the required nexus, the Court must reject Defendant's claim that his dysfunctional family life constitutes mitigation.

C. Substance Abuse

Defendant does not claim that he was under the influence of alcohol or any other substance on March 7, 1997. He appears to claim that, had he not had a substance abuse problem, he would not have been incarcerated on March 7, 1997, and thus would not have murdered Officer Lumley. This is not mitigation.

D. Defendant's Strong Relationship With His Family

The evidence supports Defendant's claim that he has a strong relationship with certain members of his family. The Court finds that this mitigating circumstance exists.

E. Psychological Background and Dysfunctional Family

Perceiving no meaningful distinction between this claim and those already addressed in subsections 3A and B of this Special Verdict, the Court concludes that this mitigating circumstance does not exist.

F. Defendant's Remorse

Under Arizona law, remorse can constitute a mitigating circumstance. As previously noted, Defendant's conduct and statements immediately before, during, and up to several months after the murder indicate a callous and remorseless attitude. In that respect, the situation that confronts the Court is similar to that in State v. Gallegos, supra, where the supreme court noted that the defendant's "initial actions evinced little remorse." 178 Ariz. at 19, 870 P.2d at 1115. Like Gallegos, Defendant ultimately expressed remorse for his conduct. This first occurred during Defendant's trial testimony. Then, on October 13, 2000, Defendant gave a detailed statement concerning his conduct and the remorse he felt. Having observed Defendant's demeanor, and having listened carefully as Defendant spoke on October 13, this judge concludes that his expression of remorse was genuine. The Court finds that this mitigating circumstance exists.

4. Weighing Process

Because one or more aggravating and mitigating circumstances have been established, the question before the Court is whether the mitigating circumstances are sufficiently substantial to call for leniency. A.R.S. §13-703(E). This determination is made not on the basis of the number of aggravating and mitigating circumstances that exist, but on the basis of their magnitude and gravity. State v. Gretzler, supra.

Each of the three aggravating circumstances is entitled to substantial weight for the following reasons:

First, Defendant was in the custody of the Arizona Department of Corrections when he killed Officer Lumley. Defendant urges that, because this is a circumstance based purely on "status," it is entitled to less weight than those aggravators that are based on something other than status. The Court disagrees. In State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983), the supreme court held as follows:

> The legislative intent of [§13-703(F)(7)] is to protect the guards and other inmates at such institutions where a defendant is confined and to discourage violence by incarcerated persons.

135 Ariz. at 512, 662 P.2d at 1019. *See also* State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984). The supporting rationales for this aggravating circumstance are sound. Taken separately or together, they militate against the claim that this aggravator is entitled to diminished weight because it is based on a defendant's status. Defendant then urges that this aggravator should be given less weight because, as of March 7, 1997, he had served most of his sentence. The Court rejects this claim.

Second, Defendant murdered Officer Lumley in an especially cruel manner. Dr. Keen's testimony establishes that Officer Lumley was conscious for several minutes before he died and that he spent his final moments in pain. That Officer Lumley would suffer such pain was not a fortuity, but a consequence that was foreseeable to Defendant.

Third, Defendant committed aggravated assault while he was awaiting sentencing for the murder of Officer Lumley. In the Court's view, the sequence of events is such that the aggravated assault conviction carries more weight than it would had it been a "prior" conviction in the traditional sense. The law is that the punishment should fit not only the offense, but the offender. Because the aggravated assault conviction constitutes powerful evidence relating to Defendant's character, the Court accords it considerable weight.

The Court has found two mitigating circumstances. In State v. White, 194 Ariz. 344, 982 P.2d 819 (1999), the supreme court held as follows:

> If more than one mitigating factor is found, such factors are weighed both separately and cumulatively against the evidence of aggravation.

194 Ariz. at 350, 982 P.2d at 825.

Defendant's remorse carries more weight than his strong relationship with members of his family because it is directly related to the crime he committed. Although his expression of remorse would be entitled to greater weight if he had acted or spoken in a manner consistent with that expression immediately after the murder, the Court accords it significant weight. In spite of this finding, the Court concludes that Defendant's expression of remorse is not sufficiently substantial to call for leniency.

Defendant's strong relationships with some members of his family did not stop him from committing two violent criminal offenses or the offense that earned him a prison sentence in the first place. These relationships, while mitigating, are not sufficiently substantial to call for leniency. *See* State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984).

Viewed collectively, the two mitigating circumstances are not sufficiently substantial to call for leniency. Therefore,

IT IS ORDERED, pursuant to A.R.S. §13-703(A), that as punishment for Count 2, first-degree murder of Officer Brent Lumley, Defendant shall suffer the penalty of death.

IT IS FURTHER ORDERED that this sentence shall run (1) consecutively to the sentence previously imposed in connection with Maricopa County Superior Court Cause No. CR 2000-000245, (2) consecutively to the concurrent terms of imprisonment imposed this date concerning Counts 5, 6, and 7 in Cause No. CR 97-03949, and (3) concurrently with the term of imprisonment imposed this date concerning Count 1 in Cause No. CR 97-03949.

DATED this 3rd day of November, 2000.

_____

David R. Cole
Judge of the Superior Court

[i] One of the other persons charged in this cause, Dino Kyzar, was ordered to pay restitution in the stipulated amount of $15,000.00. The presentence report prepared in connection with Defendant Cropper requests restitution in the amount of $14,700.00.

[ii] Although the State did not urge that the murder was senseless in its Sentencing Memorandum, it did advance this claim during oral argument on October 13, 2000.

[iii] *See* Response to State's Sentencing Memoramdum, p. 7, ll. 11-12.

[iv] Post-Gretzler decisions have identified an additional factor, i.e., witness elimination, but that factor does not apply here.

[v] *See* Exhibit 39, p. 6.

[vi] *See* Exhibit 28.

[vii] Amongst the exhibits introduced during the presentence hearing are a number of letters written by Defendant before March 7, 1997.

[viii] *See* R.T. of August 24, 1999, pp. 143-44 (State v. Dino Kyzar and Eugene Long).

[ix] *See* R.T. of April 11, 2000.

[x] The Court does not suggest that all deaths by stabbing are "especially cruel." The Court concludes that Defendant killed Officer Lumley in an especially cruel manner based on Dr. Keen's testimony and the fact that Officer Lumley's suffering was foreseeable to Defendant.

[xi] Defendant urges that he has proved both aspects of §13-703(G)(1). However, because the aspects appear in the disjunctive, a defendant need not prove both to warrant a finding that this mitigating circumstance exists.

[xii] On September 2, 1999, Defendant testified during the trial of co-defendants Dino Kyzar and Eugene Long.

[xiii] *See* Exhibit 6.

[xiv] In State v. Jones, 325 Ariz. Adv. Rep. 17 (June 15, 2000), the supreme court reaffirmed the notion that, before "dysfunctional family" evidence can constitute mitigation, it must have some "relationship to" or effect upon "the defendant's behavior at the time of the crime." *Id*. at 27. *See also* State v. Clabourne, supra; State v. Greene, supra.